85-321

No. 84-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HOWARD B. PETERSON, III,

Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; WILLIAM R. KOONTZ; WILLIAM G. MATHIS; DAVID B. COUCH; AND ARTHUR R. MAGILL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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August 27, 1985

QUESTIONS PRESENTED

I. Did this Court, in *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979), establish a *per se* rule that prevents an assessment of punitive damages against a labor union for breaching its duty of fair representation?*

II. May an airline pilot recover punitive damages from a labor union that intentionally and maliciously breached its duty of fair representation by:

> publishing a "blacklist" to prevent airlines from hiring the petitioner; and
>
> when the "blacklist" proved unsuccessful, conducting a "slowdown" of passenger flight operations coercing the airline into discharging the petitioner?

III. Does the Railway Labor Act preempt an employee's state tort action against both his union and fellow employees for civil conspiracy, blacklisting, and intentional interference with his contract of employment, despite the fact that the Railway Labor Act provides no relief for these tortious activities?

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* In *Foust*, Mr. Justice Blackmun, with whom The Chief Justice, Mr. Justice Rehnquist, and Mr. Justice Stevens joined, expressed their concern that the Court was unwisely "adopt[ing] a *per se* rule that a union's breach of its duty of fair representation [could] never render it liable for punitive damages, no matter how egregious its breach [might] be." 442 U.S., at 52-53 (Blackmun, J., concurring in result).

PARTIES TO THE PROCEEDINGS BELOW

Howard B. Peterson, III

Air Line Pilots Association, International

Piedmont Aviation, Incorporated*

William R. Koontz, a Piedmont pilot

William G. Mathis, a Piedmont pilot

David B. Crouch, a Piedmont pilot

Arthur R. Magill, a Piedmont pilot

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* Shortly after filing his Notice of Appeal with the district court, the Petitioner settled his claims against Piedmont Aviation, Incorporated. Piedmont did not participate in the proceedings in the court of appeals.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Howard B. Peterson prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above-entitled case.

REPORT OF THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published at 759 F.2d 1161 (4th Cir. 1985) and it is reproduced as Appendix A. An extract of the unreported decision of the United States District Court for the Middle District of North Carolina is reproduced as Appendix B.

JURISDICTION

The decision of the court of appeals was entered on April 15, 1985. On April 29, 1985 the Respondent Air Line Pilots Association petitioned for rehearing and suggested rehearing en banc. On May 29, 1985 the court of appeals denied rehearing and rehearing en banc. A copy of its order is reproduced as Appendix C. Jurisdiction to consider this petition is governed by the provisions of Rule 20.4 of the Revised Rules of this Court and Section 1254(1) and 2102(c) of Title 28, United States Code. (Petition to be filed within ninety (90) days of the denial of rehearing by the court of appeals.)

STATUTES INVOLVED

Although the federal cause of action—breach of the duty of fair representation—arises under the Railway Labor Act, it does not involve any specific statutory language. The state causes of action—civil conspiracy, blacklisting, and intentional interference with a contract—arise under the common law of North Carolina.

STATEMENT OF THE CASE

Factual Background.[1] This case arises out of a bitter labor dispute between the Air Line Pilots Association

[1] The facts in this case are heavily in dispute. The following factual allegations are based on petitioner's Original, Second and Third Amended Complaints, as well as 4 affidavits, 76 exhibits, and 25 depositions he filed in opposition to the respondents' motions for summary judgment. See Volumes VII, VIII and IX of the record on appeal.

(ALPA) and Wien Air Alaska (Wien), a small regional air carrier operating in the Pacific Northwest. In May of 1977, ALPA commenced a strike against Wien, but the airline continued to operate by hiring replacement pilots. The petitioner was hired as a permanent replacement at the beginning of the Wien strike. During the strike the petitioner was assaulted and beaten by striking ALPA pilots but he continued to fly throughout the twenty-one month strike.

The strike—the second longest in aviation history—was finally settled in January of 1979 after Congress directed the President of the United States to intervene and establish an Emergency Board. The Interim Report of the Emergency Board, which was accepted by all of the parties, restored the permanently replaced striking pilots to their old jobs and provided:

> Though the replacement pilots are thus displaced they remain on the Wien pilots seniority list. Assurance has been given by [Wien and ALPA] that no pilots shall be subject to discrimination, fines or harassment, either by reason of the strike or other protected activities, work during the strike or service as a replacement during the strike period.
>
> As it is our recommendation that the replacements be displaced . . . the Board recommends . . . that . . . the displaced replacements be provided . . . job opportunities with airlines other than Wien. . . .

Emergency Board No. 95-504 Presidential Report, 7 (1979).

Notwithstanding (1) its duty to fairly represent *all* of the Wien pilots and (2) its assurance to the Presidential Emergency Board that it would not retaliate against the replacement pilots, ALPA distributed "blacklists" and "scab stickers" containing the names of the pilots who had flown during the strike. The petitioner's name was included on the blacklists and scab stickers.

As they were furloughed gradually, the Wien replacement pilots encountered the blacklist. They were unable to find employment with any of the major carriers. For example, during 1979 over 2,213 airline pilots were hired by the eighteen major U.S. carriers whose pilots were represented by ALPA. Despite their excellent qualifications, current type-rating in the B-737 aircraft, recent flight experience and ready availability, none of the Wien replacement pilots—*other than the plaintiff*—were hired by these airlines.

Initially the petitioner was more successful. During the Emergency Board proceedings in 1978, some Piedmont Aviation, Inc. (Piedmont) officials testified on behalf of Wien. Management officials of the two airlines became friendly. Shortly after the Wien strike settled, a senior Wien official contacted his counterpart at Piedmont and recommended the petitioner for employment. Piedmont, unaware of the blacklist, interviewed and hired the petitioner. Notwithstanding his employment by Piedmont, the petitioner retained his position on the Wien Pilots' Seniority List.

In mid-July of 1979, rumors circulated among the

ALPA/Piedmont pilots that one of the Wien replacement pilots was flying at Piedmont. ALPA officials, including the respondent Koontz, attempted to verify the rumor and identify any Wien replacement pilot working for Piedmont. During this period the ALPA/Piedmont pilots expressed their displeasure by "slowing down" flight operations. On July 18, 1979, ALPA officials identified the petitioner as a Wien replacement pilot and expressed their displeasure to Piedmont officials.

Commencing on the morning of July 19, 1979 (and continuing even after the petitioner's discharge), various ALPA officials and members began harassing, humiliating and ridiculing the petitioner because he had flown as a Wien replacement pilot. ALPA officials, the respondents Mathis and Crouch, upon learning that the petitioner was a Wien replacement pilot, decided that he was no longer qualified to fly aircraft and subsequently refused to allow him to touch the flight controls. Although both ALPA and Piedmont officials were aware of these actions, they failed to take any action to protect the petitioner, discipline his tormentors, or stop the harassment.

On or about July 24, 1979, ALPA intensified its pilot "slowdown" to coerce Piedmont into: (1) discharging the petitioner, and (2) not considering other Wien replacement pilots for employment. When Piedmont officials became aware of the "slowdown" they contacted ALPA officials to confirm that it was linked to Piedmont's employment of the petitioner.

During the period from July 27 through August 2,

1979, over one-half (50%) of Piedmont's passenger flights were late arriving at their destinations. This pilot "slowdown" caused great inconvenience to thousands of Piedmont passengers, some of whom complained to Piedmont officials. During this period Piedmont ticket agents began informing complaining passengers that the flight delays were caused by the pilot "slowdown." During an employment interview on July 31, 1979, a Piedmont official informed another Wien replacement pilot that he would not be hired because the carrier was already experiencing a "slowdown" over the hiring of the petitioner. *See Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234 (4th Cir. 1984), *cert. denied*, _____ U.S. _____, 105 S.Ct. 2385 (1985) (Docket No. 84-1490).

On July 31-August 1, 1979, the petitioner flew as a First Officer on a flight commanded by the respondent Magill, a former ALPA official. Throughout this two-day trip the petitioner was repeatedly subjected to verbal abuse as well as embarrassed and humiliated in front of other Piedmont flight personnel. One Piedmont First Officer who observed some of the abuse told the petitioner that "he would have slugged the Captain if he had done that to him."

On August 1, 1979, ALPA's senior official at Piedmont, the respondent Koontz, attended a local union meeting where petitioner's continued employment was discussed. At this meeting it was decided to have an ALPA member who was friendly with the petitioner approach him and recommend that he consult with Piedmont's Senior Vice President for Operations and

Maintenance. On August 2nd, the ALPA member came by petitioner's apartment and made the recommendation. Petitioner's "friend" failed to inform him that ALPA wanted the call made. A short time later the petitioner made the call seeking a meeting with Piedmont officials on ways to stop the harassment. Piedmont officials invited him to fly to corporate headquarters the next day to discuss the situation. There was no discussion of resignation.

Within minutes of receiving petitioner's telephone call, Piedmont officials began notifying the crew bases and union officials that the petitioner had resigned. These statements by Piedmont officials were known to be false when uttered and were made to induce the ALPA/Piedmont pilots to stop the "slowdown."

The next day, the petitioner flew to the corporate headquarters and met with Piedmont officials. They removed him from further flight duties and requested that he execute a "letter of resignation." He refused. That same day, August 3rd, Piedmont's flight operations returned to normal. The "slowdown" was over.

Piedmont paid the petitioner for three months (through November 1979) and made token efforts to assist him in finding other employment. The plaintiff was never able to find employment with a major airline.

Procedural Background. Eleven months after being removed from flight status (and eight months after Piedmont ceased financial payments) the petitioner filed

suit in federal district court. The initial complaint alleged seven causes of action, including claims Piedmont had violated the Railway Labor Act, breached its contract of employment, and breached its duty of good faith and fair dealing.[2] The complaint also alleged four causes of action against ALPA including breach of its duty of fair representation, blacklisting, intentional interference with a contractual relationship, and civil conspiracy. The complaint also named four individual ALPA members as defendants as well as 200 John Doe defendants, alleging that they had enforced the blacklist, interfered with petitioner's contract of employment, and entered into a civil conspiracy. The complaint sought punitive damages against all parties.

Although each of the defendants raised affirmative defenses, none of them pleaded the statute of limitations. Following the pre-trial conference, the petitioner embarked on a comprehensive discovery plan which ultimately involved: some 45 depositions in Alaska, Florida, Minnesota, North Carolina, Oregon, Virginia and West Virginia; investigations and production of documents in California, the District of Columbia and Washington; locating and interviewing potential witnesses in the United States, Saudi Arabia and Singapore; and retaining and consulting with numerous expert witnesses.

Although all of the parties cooperated throughout discovery, the lawsuit was hotly contested and involved

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[2] While his case was pending on appeal, the petitioner settled all of his claims against the carrier and Piedmont is no longer a party to the proceedings.

numerous motions. On January 27, 983 the district court granted partial summary judgment to the defendants holding *inter alia* that: petitioner's pendent state tort claims were preempted by the Railway Labor Act (thus dismissing all claims against the individual pilot defendants) and that punitive damages were not available against a union for breaching its duty of fair representation. Memorandum Opinion of the District Court, App. B at 27a-34a. The petitioner was given 30 days to file an amended complaint.

The petitioner sought reconsideration of these issues or certification for interlocutory appeal. He also filed a very detailed amended complaint incorporating the facts discovered during two years of discovery. The defendants opposed reconsideration and moved to strike the amended complaint. The district court refused to reconsider its decision, denied interlocutory appeal and granted the motion to strike the amended complaint, allowing petitioner 10 days to file an amended pleading. In their answers to the newly amended complaint, the respondents for the first time raised the statute of limitations as an affirmative defense. On January 19, 1984 the district court, retroactively applying this Court's rationale in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), granted the respondents' motions to dismiss.

All adverse rulings were appealed to the Fourth Circuit which reversed the retroactive application of *DelCostello* holding that under the facts of this case, ALPA had waived its limitations defense. 759 F.2d at 1164-66, App. A at 6a-12a. However, the Fourth Circuit affirmed

the district court's holdings that:

(1) punitive damages cannot be awarded against a union for breaching its duty of fair representation, *id.* at 1166-68, App. A at 13a-15a, and

(2) the Railway Labor Act preempted petitioner's common law tort actions. *Id.* at 1168-71, App. A at 16a-22a.

Subsequently the Fourth Circuit denied ALPA's request for rehearing and suggestion for rehearing en banc. App. C.

REASONS FOR GRANTING THE WRIT

This petition raises two familiar issues in labor law litigation. First—Under what circumstances may punitive damages be awarded against a labor union? Second—What types of common law tort actions are preempted by the federal labor laws? For the reasons that follow it is respectfully submitted that this case provides the Court with an appropriate vehicle to clarify further the law on these important labor law issues.

The Federal Court of Appeals has Decided a Federal Question (Punitive Damages) in a Way that Conflicts with the Decision of a State Court of Last Resort

The lower courts, both federal and state, continue to grapple with the problem of punitive damage awards against labor unions. Their uncertainty is caused in part by the Court's decision in *International Brotherhood of*

Electrical Workers v. Foust, 442 U.S. 42 (1979). Although certiorari was granted in *Foust* "to resolve the conflict among the Courts of Appeals as to what if any circumstances justify assessing punitive damages against a union that breaches its duty of fair representation," *id.* at 46, the actual holding of the Court does not specifically resolve the question. The Court held that:

> [b]ecause general labor policy disfavors punishment, and the adverse consequences of punitive damages awards could be substantial, we hold that such damages may not be assessed against a union that breaches its duty of fair representation by failing properly to pursue a grievance.

Id. at 52. The lower courts' uncertainty developed both because of the broad sweep of the language in the majority decision and the concerns expressed by the four concurring Justices that the Court was unwisely adopting "a *per se* rule that a union's breach of its duty of fair representation can never render it liable for punitive damages, no matter how egregious its breach may be." *Id.* at 52-53 (Blackmun, J., concurring in result).

Should *Foust* be limited to its actual holding or did the concurring Justices correctly assert that the Court was establishing a *per se* rule? The federal courts of appeals which have addressed the issue have uniformly held that the Court established a *per se* rule barring punitive damages for any breach of the duty of fair representation. *See, e.g., Peterson v. Air Line Pilots Association*, *supra*, 759 F.2d at 1166-68, App. A at 13a-15a; *Quinn v.*

DiGiulian, 739 F.2d 637, 647-48 (D.C.Cir. 1984) (incumbent union officials harassed and caused discharge of candidate for union office); *Lewis v. Laborers' Local 100*, 750 F.2d 1368, 1381-82 (7th Cir. 1984) (discriminatory hiring hall practices).

In *Seritis v. Hotel and Restaurant Employees Union, Local 28*, 167 Cal.App.3d 78, 213 Cal.Rptr. 588 (1st Dist. 1985), App. D, the First Appellate District of the California Court of Appeals affirmed an award of punitive damages for a union's egregious breach of its duty of fair representation. In doing so, the court of appeals specifically rejected the proposition that *Foust* established a *per se* rule against punitive damages. *Id.* at 93, 213 Cal.Rptr. at 595, App. D at 55a. On August 15, 1985 the Supreme Court of California denied hearing in *Seritis*. The court also ordered that the case not be published in the official appellate reports. App. E at 62a.

Bad facts make bad law. The facts of the *Foust* case—the negligent mishandling of a grievance—fail to support an award of punitive damages under any theory. On the other hand the facts of the *Seritis* case—young womens' job opportunities and continued employment linked to providing sexual favors for union officials—cry out for punitive damages. Since both cases involve a union's breach of its duty of fair representation, any *per se* rule will fail to do justice to the parties.

The *Quinn v. DiGiulian* case, *supra*, also offers some insight into the problem confronting the lower courts. In that case, the plaintiff (Quinn) announced his candidacy

for union office held by one of the defendants (DiGiulian). "[Quinn] immediately became the target of a relentless campaign of harassment—including trumped-up disciplinary charges, fines and suspension from the Local—culminating finally in his discharge from his job." 739 F.2d at 638. The facts clearly supported a punitive damage award and the jury awarded both compensatory and punitive damages for violations of the "bill of rights" provisions of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411, and the breach of the duty of fair representation. On appeal, the Court of Appeals for the District of Columbia Circuit, interpreting *Foust* as establishing a *per se* rule, struck the jury's punitive damage award on the duty of fair representation claim. The punitive damage award under the LMRDA claim was allowed to stand—but only after the court went through some tortuous logic to distinguish the concerns of the *Foust* majority regarding punitive damages against labor unions. 739 F.2d at 638-39.

It is respectfully submitted that the focus of the Court's analysis in *Foust* was misplaced. The focus should be on the egregious nature of the conduct under study, not on whether the cause of action is styled as breach of the duty of fair representation or whether the defendant is a labor organization. As Justice Blackmun pointed out, prior to *Foust*, the courts of appeals were unanimous in their refusal to erect a *per se* bar to punitive damages against unions, both in unfair representation cases and in LMRDA cases. 442 U.S. at 60. Because of the turmoil in the lower courts over the meaning of *Foust*, perhaps it is time to adopt Justice Blackmun's

suggestion that

> [i]f the Court feels obliged to devise some "careful balance of individual and collective interests" here . . . the solution, in my view, is not to ban punitive damages across the board, but to restrict them to their proper sphere, namely, to those rare cases where the union's conduct can truly be described as outrageous.

Id. It is respectfully submitted that petitioner's case is an appropriate vehicle to readdress the question of whether punitive damages may be awarded for a union's egregious breach of the duty of fair representation.

A Decision by This Court is Necessary to Settle Important Questions of Law Regarding Preemption Under the Railway Labor Act

Both the district court and the court of appeals held that petitioner's common law tort claims (blacklisting, intentional interference with contractual relations, and civil conspiracy) against ALPA and the individual pilot defendants were preempted by the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.* (1982). It is respectfully submitted that these decisions were in error, *especially as those holdings pertain to the individual pilot defendants.*

Although an employee's common law tort suits against his exclusive representative may certainly impact on labor-management relations and thus be subject to outside constraints, it does not follow that the employee's common law tort suits against his fellow employees should be subject to the same considerations. The peti-

tioner sued the individual pilots both in their individual capacities and as officers, agents and representatives of ALPA. Since the RLA does not provide any basis for one employee to sue another employee for tortious conduct, petitioner's causes of action were necessarily filed as pendent state claims.

Under general agency principles, a union is liable for the actions of its *officers* and *employees* performed within the scope of their authority. However, a union generally is not liable for the acts of its *members* unless it authorizes, participates in, or ratifies their acts. The lower courts' decisions preempting petitioner's tort causes of action against the individual defendants failed to take into account the possibility that ALPA might not be held liable for the actions of its members.

The labor law preemption holdings of this Court do not support the proposition that individuals may escape liability for their tortious acts simply because they are members of a labor union or their actions took place in the context of a labor dispute. It is respectfully submitted that the lower courts' decisions raise important questions regarding the scope of the labor preemption doctrine as it applies to *individuals*.

CONCLUSION

For the reasons set forth above, the Court should issue a writ of certiorari to the Fourth Circuit and set the case for plenary briefing and argument.

Respectfully submitted,

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August 27, 1985

APPENDICES

APPENDIX A

Decision of the
United States Court of Appeals
for the Fourth Circuit

April 15, 1985

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HOWARD B. PETERSON, III, *Appellant,*	
v.	No. 84-1186
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,	Argued: November 1, 1984
	Decided: April 15, 1985
Appellees.	

Appeal from the United States District Court
for the Middle District of North Carolina
at Winston-Salem. Eugene A. Gordon,
Senior District Judge. C/A 80-341

Before WIDENER and MURNAGHAN, Circuit Judges,
and BUTZNER, Senior Circuit Judge.

MURNAGHAN, Circuit Judge

Appellant Howard B. Peterson, III, a former pilot for Piedmont Aviation, Inc. ("Piedmont"), has alleged that the Airline Pilots Association, International ("ALPA") and known and unknown union members coerced Piedmont into firing him for failing to respect a nationwide

ALPA sponsored job action. Peterson contends that the union thereby failed to live up to its duty of fair representation and, together with individual pilots, violated North Carolina law prohibiting blacklisting, conspiracy, and interference with a contractual relationship. In two orders granting summary judgment in favor of ALPA, the district court ruled that Peterson's state law claims were preempted by the Railway Labor Act, that punitive damages could not be assessed against union defendants, and that Peterson's duty of fair representation claim was time barred.

I.

From May 1977 to January 1979 Peterson was a replacement pilot for Wien Air Alaska, Inc. during a nationwide ALPA sponsored strike. As part of the agreement ending Wien's labor dispute, striking pilots replaced non-union pilots, non-union pilots were furloughed, and ALPA promised there would be no reprisals or recriminations against pilots who had flown during the strike.

In May 1979 Peterson was hired by Piedmont Airlines. All Piedmont employees were represented by ALPA and were protected by the ALPA-Piedmont collective bargaining agreement.[1] Peterson flew without incident until a fellow Piedmont pilot learned, some time in July 1979, that Peterson previously was a strike-breaker. Over the

[1] Peterson had no written employment contract with Piedmont and was protected only by the terms of the collective bargaining agreement. Under the agreement, Peterson was a probationary employee for the first twelve months and could be discharged at Piedmont's discretion.

next several weeks, the complaint alleges, Peterson was harassed by individual pilots and ALPA sponsored a slowdown of flight operations designed to pressure Piedmont into firing Peterson. Peterson further alleges that on or about August 2, 1979 he was taken off active flight duty by Piedmont and was told to find employment elsewhere. Peterson, however, apparently was paid by Piedmont until he secured another job with a different airline.

In July 1980, eleven months after the date of his alleged termination, Peterson filed a complaint in federal court claiming that he had been blacklisted by ALPA. His first complaint contained seven causes of action, including claims that Piedmont violated the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1982) ("the RLA"),[2] breached the contract of employment, and did not live up to its duty of good faith and fair dealing. The complaint also asserted causes of action against ALPA, alleging a breach of the duty of fair representation, blacklisting, intentional interference with a contractual relationship, and civil conspiracy. The complaint sought punitive damages against all parties. The defendants answered the complaint, and, for the next several years, extensive discovery ensued.

On January 27, 1983 the district court, on motions for summary judgment by ALPA, entered an order dismissing six of Peterson's seven causes of action. The court held that appellant's state tort claims were preempted by the RLA (thus dismissing claims against individual union

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[2] In 1936, Congress extended the RLA to the air transportation industry. *See* 45 U.S.C. §§ 181-188 (1982).

members), that punitive damages against ALPA were unavailable under the RLA, and that appellant failed to state a cause of action against Piedmont for interfering with union activities. The district court denied summary judgment and left outstanding Peterson's claim against ALPA for breach of the duty of fair representation.

In that same order Peterson was granted leave to amend his complaint within thirty days to add Piedmont to his claim against ALPA for a breach of its duty of fair representation. On February 23, 1983 Peterson filed a second amended complaint;[3] however, because the amended pleading went beyond the scope of the district court's order, the complaint was stricken on August 11, 1983. On August 19, 1983 Peterson filed his third amended complaint.[4]

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[3] On March 29, 1982 Peterson had unsuccessfully moved to file a first amended complaint. The motion was denied because the proposed amendments were unduly delayed and sought to bring in additional parties which, according to the district court, would prolong the litigation to the prejudice of ALPA.

[4] There was no change of substance between the pleading of the claim of breach of duty of fair representation in the initial complaint and the allegations of that cause of action in the third amended complaint. The initial complaint alleged that:

> The defendant ALPA breached its duty of fair representation to the plaintiff by instigating, directing, controlling, and participating in a conspiracy to injure the plaintiff. The outrageous and unlawful conduct alleged in paragraphs 1 through 32 demonstrates that the defendant ALPA's actions were arbitrary, discriminatory and in bad faith.

The third amended complaint recites:

> Defendant ALPA, as plaintiff's exclusive bargaining representative while he was employed by Piedmont and while listed on the WIEN pilot seniority roster, breached its duty of fair representation owed to plaintiff by its arbitrary, discriminatory, and bad faith actions as hereinabove alleged, thereby directly and

While appellees' motion to strike the second amended complaint was pending, the Supreme Court on June 8, 1983 ruled in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983) that a uniform six month limitation period applies to hybrid duty of fair representation claims under the National Labor Relations Act. On August 29, 1983 ALPA filed its amended answer wherein, some three years after Peterson originally accused the union of breaching its duty of fair representation and three years after ALPA first joined issue by answering the initial complaint without asserting a time-bar, for the first time raised a limitations defense. Piedmont's answer similarly asserted that appellant's fair representation claim was time-barred. Motions to dismiss the complaint were filed and, on January 14, 1984, the district court granted defendants' motions. Since that time Peterson has settled his dispute with Piedmont, but he appeals the January 27, 1983 and January 14, 1984 orders insofar as they relate to ALPA and individual union members.

II.

Normally, the first issue we should have to consider would be the length of the applicable limitations period, whether the six months announced in *DelCostello*, the two year period found in 45 U.S.C. § 153 First (r), or a time span lasting one year or possibly three years as pro-

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proximately damaging the plaintiff. These actions against plaintiff were committed willfully, intentionally, wantonly, maliciously, vexatiously, and for oppressive reasons.

vided by the most analogous North Carolina statute.[5] That issue, however, currently engages the attention of another panel of the Court.[6] It is not profitable for us to complicate the matter since on our view of things, even assuming that the shorter six months limitations period applies, nevertheless, time-bar has not occurred. That is so because the case established a principle of law new enough that neither Peterson in filing his complaint, nor ALPA in answering it, sought to take advantage of the new principle. ALPA, by failing to raise a limitations defense for three years after the case was initiated, has waived its right to rely on *DelCostello*.

The initial complaint against ALPA was answered on September 8, 1980 without any reference to limitations as a defense against the duty of fair representation cause of action. That cause of action was initiated eleven months after its accrual, and it was not until August 29, 1983 that ALPA decided to press for summary disposition on grounds of limitations. It is well settled that the defense of limitations is waived unless asserted promptly by way of answer or motion. *See Weinberger v. Salfi*, 422 U.S. 749, 764 (1975); *Hayden v. Ford Motor Co.*, 497 F.2d 1292, 1293-95 (6th Cir. 1974); *Strauss v. Douglas Aircraft Co.*, 404 F.2d 1152, 1154-56 (2d Cir. 1968); Fed. R. Civ. P. 8(c). *See also Metropolitan Housing*

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[5] North Carolina provides a one year statute of limitations for intentional torts, *see* N.C. Gen. Stat. § 1-54 (1983) and a three year period for simple negligence, *see* N.C. Gen. Stat. § 1-52 (1983). If reference to either North Carolina statute is appropriate, Peterson's complaint would have been filed timely regardless of how his duty of fair representation claim is characterized.

[6] *Zemonick v. Consolidation Coal Co.*, No. 84-1353 (4th Cir., argued 10/3/84).

Development Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1287 (7th Cir. 1977). Although waiver is not automatic, requiring a showing of prejudice or unfair surprise, *see generally* 5 Wright & Miller *Federal Practice and Procedure* § 1278 (1969 & Supp. 1984), we are persuaded by considerations of fairness, entirely separate from the extensive investment of time and energy expended on discovery before the action was dismissed on limitations grounds.

Under traditional jurisprudential principles Peterson, as plaintiff, is charged with anticipating that the Supreme Court would establish the six months limitations period for his duty of fair representation claim. At the same time what is sauce for the goose is sauce for the gander —fairness calls for uniform application of the same principle to the defendant, in that ALPA had as much cause to anticipate *DelCostello* as did Peterson. Had ALPA shown the necessary perspicacity so to plead to the original complaint, Peterson would have no viable basis to attack a limitations defense. In such instance ALPA would have been entitled to a complete victory at the early pleading stage, regardless of the strength of plaintiff's claim on the merits.[*] ALPA's brief implies that it could not have raised a statute of limitations defense until after *DelCostello* was decided, but certainty of success is not a prerequisite to deciding whether to assert an

[*] By the same token, if Peterson's counsel had exhibited a like perspicacity the action would presumably have been filed within six months and we would have been spared the necessity of separating here the wheat from the chaff. For ALPA to prevail on the grounds of unanticipatability would really be unfair, for Peterson then should also benefit from the same contention. Then, perhaps, *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) would apply to make the bringing of the action timely.

affirmative defense in a pleading.[8] *See Perez v. Dana Corp.*, 718 F.2d 581, 584 (3d Cir. 1983) where the union defendants several years before *DelCostello* was decided anticipated the result in that case and raised a six-months limitation defense.[9] Consequently, since neither side anticipated *DelCostello* Peterson is entitled to a safe harbor. In short we leave the parties where we find them.

The same result should obtain despite the fact that Peterson filed a series of amended complaints.[10] It is true

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[8] It is significant that ALPA made no move to raise a limitations defense in 1981 based on Justice Stewart's concurring opinion in *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 65-71 (1981) (concurring in part and dissenting in part). In *Mitchell*, Justice Stewart concluded that a suit against the union for breach of the duty of fair representation should be subject to the six month limitation period found in § 10(b) of the NLRA. That very argument was adopted by the majority in *DelCostello*.

[9] Our application of *DelCostello* in *Murray v. Branch Motor Express Co.*, 723 F.2d 1164 (4th Cir. 1983), *cert. denied*, 105 S.Ct. 292 (1984) did not involve a similar claim of delay in raising a limitations defense. Similarly, in *Zemonick v. Consolidation Coal Co.*, No. 84-1353 (4th Cir. argued 10/3/84), no question of waiver was raised. Thus, in those cases we had no occasion to consider the waiver argument pressed by Peterson.

[10] Since ALPA's right to file an amended answer was triggered by the filing of an amended complaint, there was no occasion for the district court to rule on whether a motion pursuant to Federal Rule of Civil Procedure 15(a) to amend the answer should have been granted. Under Rule 15(a) leave to amend pleadings should "be freely given when justice so requires." *See Foman v. Davis*, 371 U.S. 178 (1962). Had the district court ruled favorably on a motion by ALPA under Rule 15(a), our review would focus on whether there was an abuse of discretion. *See Lawson v. Truck Drivers, Local 100*, 698 F.2d 250, 256 (6th Cir. 1983).

Nonetheless, we simply conclude that justice [cont'd]

that in cases where, from the very outset, no cloud obscured the right of the defendant to plead limitations, courts have permitted defendants to raise limitations even though not asserted as a defense in the original answer. *See, e.g., Pierce v. County of Oakland*, 652 F.2d 671 (6th Cir. 1981). Here, however, the eclipse was great enough to convince counsel for both parties that neither the threat nor the advantage of limitations was present. In the present case ALPA was on notice since July 7, 1980 that Peterson was asserting a breach of the duty of fair representation. Subsequent amendments to the complaint did not affect the substance of the claim; consequently, for all practical purposes ALPA waited for over three years before raising a limitations defense.

Equally important, the statute of limitations set out in *DelCostello*, although serving national labor policies,[11] is still a personal defense. As such it is "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber . . . . The theory is that even if one has a just claim it is unjust not

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would not, in the particular non-assertion circumstances of the case, be served by allowing ALPA to raise a statute of limitations defense. The interests of justice are better served by giving Peterson the opportunity to press his claim rather than by allowing ALPA to take advantage of a technical defense which was never anticipated by either party. The oversight lies equally at the door of each of them, and one should not be allowed the advantage, as between them.

[11] The federal labor policy favoring prompt resolution of disputes is somewhat attenuated in the present case. Peterson no longer works for Piedmont and has not sought reinstatement. Similarly, the nationwide strike that forms the backdrop of the case has long been settled, and ALPA's conduct here was not in pursuit of a collective bargaining agreement, nor was ALPA responding to Piedmont's breach of the collective contract.

to put an adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). At the time Peterson filed his claim ALPA cannot claim it was surprised or prejudiced by a stale claim. Indeed for three years ALPA presumed the action was filed timely and engaged in extensive discovery. Thus, the purpose served by limitation periods—to allow an adversary repose—would not be furthered by allowing ALPA to raise the defense at the eleventh hour. *See Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 428 (1965) (The "policy of repose, designed to protect defendants, is frequently outweighed . . . when the interests of justice require vindication of the plaintiff's rights").[12]

This, in short, is not the case of a delinquent plaintiff whose counsel alone deserved smearing with pitch for delay in filing suit. Rather the attorneys for both plaintiff and defendant were, to the extent that pitch should

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[12] A case presenting an answer to a complaint where the limitations defense was altogether apparent, well established at law but simply overlooked when the defendant first pleaded to the original complaint, stands on a rather different footing. In that instance it may justly be said that, assuming the limitations defense can ultimately be made out, the case should never have been brought. Such is not the case here where, until *DelCostello* came down, the *general* view was that longer time bars under analogous state statutes controlled. *See Howard v. Aluminum Workers International*, 589 F.2d 771 (4th Cir. 1978). Nor is this a case where the statute of limitations may be said to be jurisdictional. *See KSLA-TV, Inc. v. Radio Corp. of America*, 732 F.2d 441 (5th Cir. 1984). Here counsel for the plaintiff and defendants equally had, if not every reason, at least substantial reason to believe suit was timely and, hence, immune from a defense of limitations.

be applied at all, tarred with the same brush. The uniformity and promptness decreed by *DelCostello* in instituting unfair representation cases will not seriously be frustrated by allowing an odd case to proceed where, if counsel for the plaintiff nodded, the defendant's lawyer slumbered to no less a degree. In the case of the initial complaint the plaintiff had already successfully negotiated the limitations hurdle only to fall afoul of a rule permitting a limitations defense, which had not earlier been raised, to be introduced only because a subsequent amended complaint, no different as to the operative language of the count here involved, was filed. The portions of the original complaint with which we are concerned, the allegations of breach of a duty of fair representation, were not deemed by the district judge to be inadequate or defective. The rule allowing a limitations plea not made to an original complaint to be made to an amendment properly has no application to a claim whose nature has not been substantially affected by the amendment.[13]

Because both the plaintiff and the defendant assumed that a limitations period of at least one year governed the action, we are unwilling to ratify a result of unwarranted harshness and will not cut off Peterson's right to have a full hearing on the allegations contained in his complaint, which, on its face, at least, has substantial merit.[14] Accordingly we reverse the holding that the action was time-barred.

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[13] *See United States v. Mechanik*, 735 F.2d 136, 140 (4th Cir. 1984), where a superseding indictment deemed defective was held, in effect, to have revivified those portions of the original indictment not suffering the malaise infecting the superseding indictment.

[14] We appreciate that a defense on the merits may, of course, ultimately

III.

Having reinstated Peterson's federal claim, we must decide whether, if he ultimately prevails on the merits, punitive damages may be assessed against ALPA. Previously, in *Harrison v. United Transportation Union*, 530 F.2d 558, 563 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976) we held that punitive damages were available if the union acted wantonly, maliciously or in reckless disregard of an employee's rights. *Harrison*, however, was effectively overruled by *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979). In that case the Supreme Court held that punitive "damages may not be assessed against a union that breaches its duty of fair representation by failing properly to pursue a grievance." *Id.* at 52. Peterson argues that the holding in *Foust* should be limited to the grievance and arbitration context and, that, in any event, punitive damages should be available where the union, acting intentionally and maliciously, procures the discharge of an employee because of his prior refusal to honor a strike. We are satisfied, however, that in *Foust* the Supreme Court has established a *per se* rule prohibiting punitive damages in all duty of fair representation actions.

Foust involved punitive damages levied against a union which had mishandled an employee's grievance by

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prevail when all the disputes of fact have been resolved, and we express no view as to which party should ultimately prevail. Although presented with motions for summary judgment, the district court went off on purely procedural grounds, never reaching the merits. We express no view on whether summary judgment on the merits would be appropriate. We only insist that the plaintiff should be permitted onto the judicial playing field.

filing it two days after the dead-line specified in the collective bargaining agreement. Distinguishable is the present appeal, in which Peterson alleged that he was the victim of a nation-wide conspiracy to retaliate against pilots who flew during an ALPA sponsored strike. Despite the difference, a close reading of *Foust* demonstrates that the ban on punitive damages is not limited to the arbitration and grievance context but applies to all fair representation actions.

The issue presented in *Foust* was "what if any circumstances justify assessing punitive damages against a union that breaches its duty of fair representation." 442 U.S. at 46. One circumstances squarely presented but not relied upon by the majority was the absence of any proof of union animus against the employee. Justice Blackmun noted in his concurrence that "[t]he union's conduct here betrayed nothing more than negligence, and thus presented an inappropriate occasion for awarding punitive damages under any formula." *Id.* at 53 (Blackmun, J. concurring). Justice Marshall, writing for the majority, eschewed that narrower ground, however, and assumed that the jury had before it an instance where the union acted maliciously.[15] More importantly, the majority took

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[15] Justice Marshall made clear that his holding applied to intentional and malicious union conduct. Responding to Justice Blackmun the majority wrote:

> The court below further determined that the jury instructions comported with this legal standard. The District Court had charged the jury that it could award punitive damages if petitioners acted "maliciously, or wantonly, or oppressively."
>
> Mr. Justice Blackmun surmises that "as a matter of law," the union's conduct "betrayed nothing more than negligence." *Post*, at 53. This conclusion necessarily assumes that there was insufficient evidence of malicious, wanton, or oppressive conduct to justify the

no exception to Justice Blackmun's statement, joined by three other members, that "[t]he Court now adopts a *per se* rule that a union's breach of the duty of fair representation can never render it liable for punitive damages, no matter how egregious its breach may be." *Id.* at 52-53. The absence of any rebuttal to the *per se* charge, coupled with the majority's rather obvious reaching out to avoid a more narrow basis for its decision, demonstrates that *Foust* created a barrier protecting the union against punitive damage awards in all fair representation actions. The circuit courts which have considered the issue are in accord. *See Quinn v. DiGuilian*, 739 F.2d 637, 647 (D.C. Cir. 1984); *Wells v. Southern Airways, Inc.*, 616 F.2d 107, 109 n.1 (5th Cir. 1980), *cert. denied*, 449 U.S. 862 (1980) (dicta); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1216 (8th Cir. 1981), *cert. denied*, 454 U.S. 968 (1981) (dicta).[16]

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jury's punitive damages award. We, however, are unwilling to substitute our judgment for that of the jury, District Court, and Court of Appeals on this essentially evidentiary question.

442. U.S. at 46 n.7.

[16] The policy considerations articulated in *Foust* lend further support to our reading. In *Foust* the Supreme Court analyzed "[w]hether awarding punitive damages would comport with . . . national labor policy," 442 U.S. at 48, and stated that "the overarching legislative goal" of the RLA is to "facilitate collective bargaining and to achieve industrial peace," and not to punish. The Court concluded that punitive damage awards against a union would not advance national labor policies, even where the union's conduct was malicious. Admittedly several arguments in support of that conclusion are germane only where the union does not fairly pursue employee grievances. The threat that punitive damages might impinge on union discretion in handling grievances and force unions to pursue frivolous claims or resist fair settlements, for example, seems to have little significance where it is alleged that the union maliciously sought to force the discharge of an employee who exercised his right not to honor a strike. Undoubtedly imposing punitive damages in the present context would be a powerful incentive for the unions to act

IV.

In another "variant of a familiar theme," *Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669, 675 (1983), *quoting San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 239 (1959), we must determine whether Peterson's pendent state law causes of action against ALPA and union members for civil conspiracy, unlawful blacklisting, and interference with a contractual relationship are preempted by his federal duty of fair representation claim.

The preemption doctrine, more familiar terrain under the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982), has been affected by two competing concerns. *See Farmer v. United Brotherhood of Carpenters & Joiners*, 430 U.S. 290, 295 (1977). In the first place, preemption of state law is required in order to protect the primary jurisdiction of the administrative agency created by Congress to oversee the development of uniform rules of law governing labor-management relations. *See Vaca v. Sipes*, 386 U.S. 171, 178-79 (1967). Thus, state (and federal) courts generally may not adjudicate claims based on conduct that is protected or prohibited by federal labor law, or arguably so. *San Diego Building Trades Council v. Garmon*, 359 U.S. at 244-45. *Cf. Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 375-77 (1969). On the other hand, the Supreme Court has been unwilling to "declare pre-empted all local

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fairly. Offsetting potential benefits, however, "is the possibility that punitive awards could impair the financial stability of unions and unsettle the careful balance of individual and collective interests which [the Supreme Court had] previously articulated in the unfair representation area." *Id.*

regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions. . . ." *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289 (1971). Consequently, where the conduct sought to be regulated by state law is only a "peripheral concern" of federal labor law or touches interests "deeply rooted in local feeling and responsibility," we are instructed that the preemption inquiry requires a sensitive balancing of the potential harm to the federal scheme against the importance of the state's interest in protecting its citizens. *Farmer*, 430 U.S. at 296-97.[17]

Preemption under the RLA has followed a similar tack, but a more stringent pattern of judicial deference has emerged. The scheme of remedies and procedures carefully crafted in the RLA has long been interpreted as evidence of congressional intent significantly to limit an aggrieved employee's right to resort to state law as an alternative remedy for a wrongful discharge. *See Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972). Garden variety wrongful discharge actions, so-called "minor disputes" involving rights under the collective bargaining agreement, ordinarily are subject to the mandatory arbitration procedure provided in 45 U.S.C.

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[17] Under the "local interest" exception to the preemption doctrine, the Supreme Court has authorized state law causes of action for the tort of intentional infliction of emotional distress, *Farmer v. United Brotherhood of Carpenters and Joiners of America*, 430 U.S. 290 (1977), trespass, *Sears Roebuck & Co. v. Carpenters*, 430 U.S. 290 [*sic*] (1978), malicious libel, *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1960), and mass picketing and violence, *Automobile Workers v. Russell*, 356 U.S. 634 (1958).

§ 153 First (i) and are routinely held to be within the exclusive jurisdiction of the arbitral authority created by the statute. *See Andrew v. Louisville & Nashville Railroad Co.*, 406 U.S. at 324-25. As the Supreme Court explained in *Union Pacific Railroad v. Sheehan*, 439 U.S. 89, 94 (1978) "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." *See also Air Line Pilots Association v. Texas International Airlines*, 656 F.2d 16, 19 (2d Cir. 1981). Unlike preemption under the NLRA, the preemption of state law claims under the RLA has been more complete. *See, e.g., Minehart v. Louisville & Nashville Railroad Co.*, 731 F.2d 342 (6th Cir. 1984); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1000 (1984); *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978), *cert. denied*, 439 U.S. 930 (1978); *Major v. U.S. Air, Inc.*, 525 F. Supp. 853 (D. Md. 1981).[18] Consequently, in approaching the preemption question we are mindful that Peterson's right to resort to state law to vindicate his wrongful discharge claim has been circumscribed in the first instance by the RLA.

Peterson's duty of fair representation claim, now proceeding only against ALPA, is, of course, not itself preempted by the arbitration machinery mandated by the

[18] The legislature's intent to preempt wrongful discharge actions is plain from the statute itself. The RLA has made "any grievance" arising out of the collective bargaining agreement subject to exclusive arbitral remedies. *See* 45 U.S.C. § 153 First (i) (1982). In contrast the NLRA is limited to specific conduct subject to either protection or prohibition by 29 U.S.C. §§ 157-158 (1982).

RLA. *See Czosek v. O'Mara*, 397 U.S. 25, 27-28 (1970) the claim against the union for breach of the duty of fair representation is a discrete claim from the right of an individual to pursue his grievance under the RLA). *Cf. Vaca v. Sipes*, 386 U.S. at 180-81. Since Peterson has alleged that his discharge by Piedmont was the product of unlawful union discrimination, his only remedy is to sue ALPA in state or federal court. *Id.* Consequently, there is no question that federal jurisdiction over Peterson's entire complaint was proper. Instead, the preemption inquiry in the present case is whether the duty of fair representation claim itself "preempts" the power of the district court to exercise its pendent jurisdiction over related state law claims. To resolve the question, we refer to NLRA cases since we believe the risk of state interference with the effective administration of national labor policy is present here even though the exclusive jurisdiction of the arbitrator is not at issue.

At the outset we note that the allegations contained in Peterson's complaint can hardly be called a peripheral concern to federal labor law. *Compare Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966). The duty of fair representation is a corollary of the union's status as the exclusive representative of all employees in a bargaining unit. *See International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 46-47; *Vaca v. Sipes*, 386 U.S. at 182. When the union has abused its power, the duty of fair representation stands as "a bulwark to prevent arbitrary union conduct. . . ." *Vaca v. Sipes*, 386 U.S. at 182. The importance of the federal interest is such that the duty of fair representation cause of action is governed exclusively by federal law even when the

claim is filed in state court. *Id.* at 178.

A careful examination of Peterson's complaint also demonstrates that the underlying dispute draws its basic character from ALPA's alleged violation of federal law, and that the state law claims, in both substance and relief, are identical to the federal claim. The only losses Peterson has sustained were caused by his wrongful discharge. Under federal law Peterson may recover all of his damages if he can prove they were attributable to the union's misconduct. *See Czosek v. O'Mara*, 397 U.S. at 28-29; *Vaca v. Sipes*, 386 U.S. at 197-98. The causes of action for conspiracy, interference with a contractual relation, and unlawful blacklisting add nothing by way of relief. Peterson does not seek compensation for any injury beyond that which would be awarded if successful on the duty of fair representation claim.[19]

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[19] Peterson's reliance on the "outrageous conduct" exception to preemption, *Farmers v. Brotherhood of Carpenters & Joiners*, 430 U.S. 290 (1977), is thus misplaced. In *Farmer* the Court held that a California state court could exercise jurisdiction over a tort action brought by a local union officer against his union for intentional infliction of emotional distress. In analyzing whether preemption was required, the Court noted that the state had a substantial interest in protecting its citizens from alleged outrageous conduct. *Id.* at 302. The Court also noted that the potential conflict with the federal scheme was minimal because the state claims focused on "the abusive manner in which the discrimination [was] accomplished or threatened rather than a function of the actual or threatened discrimination." 430 U.S. at 305. The Court emphasized, however, that a union's violation of the NLRA could not form the basis of outrageous conduct for a state tort action. Here, even a cursory reading of Peterson's complaint demonstrates that, unlike the situation in *Farmer*, his injury was purely a function of unlawful job discrimination, and that the overlap between his state and federal claims is substantial.

Peterson's complaint instead is akin to *Amalgamated Association of Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), where the Supreme Court held that the preemption doctrine barred a state breach

More importantly, Peterson's state law claims not only focus on conduct prohibited by federal law, the state claims are essentially identical to the duty of fair representation claim. The district court found that Peterson had no written employment contract and, as an "at will" employee under North Carolina law, *Nantz v. Employment Security Commission*, 290 N.C. 473, 226 S.E.2d 340 (1976); *Brooks v. Carolina Telephone & Telegraph Co.*, 56 N.C. App. 801, 290 S.E.2d 370 (N.C. App. 1982), was protected only by the terms of the collective bargaining agreement and by any rights he might have under the RLA. To recover under either the state or federal claims Peterson must prove that Piedmont's discharge violated the collective bargaining agreement and that the union caused his discharge, which would be a violation of its duty of fair representation, a violation of the Wien Air settlement agreement and, by sponsoring a slowdown of flight operations, a violation of obligations under the collective bargaining agreement with Piedmont. In short, if Peterson can recover on his state law claims, it will be because he has established a violation of federal law. In addition, although the state's interest in protecting Peterson is not insignificant, the interpretation of collective bargaining agreements and the range of economic self-help under the RLA available to the union are matters which must be determined by federal law. *See Brotherhood of Railroad Trainmen v. Jacksonville Railroad Terminal*, 394 U.S. at 377-82.[20]

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of contract claim against a union for procuring the discharge of an employee. In *Lockridge* the Court in *dicta* criticized the view that jurisdiction over a breach of contract claim was proper because in essence the action vindicated the same rights as a duty of fair representation claim. *Id.* at 298-301.

[20] Cases such as *Linn v. United Plant Guard Workers*, 383 U.S. 53

In light of the significant overlap of the state and federal claims, it becomes apparent that Peterson seeks to pursue the state claims merely to take advantage of more liberal remedies. Since Peterson's state claims seek to vindicate rights largely secured by federal law, the potential conflict between remedies and administration are too great to permit the state claims to stand. *See In re Sewell*, 690 F.2d 403, 409 (4th Cir. 1982).

Accordingly, we reverse the dismissal on limitations grounds of the federal duty of fair representation claim and affirm the dismissal of the punitive damage claim and the common law claims.

AFFIRMED IN PART and
REVERSED IN PART.

(1966), which involved malicious libel, provide little support for Peterson's position. *Linn* involved a traditional common law tort which can truly be said to be but of peripheral concern to labor law. 383 U.S. at 61. Here, ALPA's conduct and possible defenses raise questions of federal law, which would have to be resolved in order to rule on the state claims.

APPENDIX B

Extracts from the Memorandum Opinion of the United States District Court for the Middle District of North Carolina

January 27, 1983

IN THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

HOWARD B. PETERSON, III, *Plaintiff*	)	
v.	)	No. C-80-341-WS
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*, *Defendants*	)	

MEMORANDUM OPINION

GORDON, Senior Judge

The parties in this case, the plaintiff Peterson, a former first officer for Piedmont Airlines, and defendants, Piedmont Airlines, Airline Pilots Association (ALPA), and various individual pilots, are before the Court on motions for summary judgment by the defendants, a motion to strike the case from the jury calendar by ALPA and the individual pilots, and a motion to negate a stipulation by Peterson.

After reading the many briefs, affidavits and depositions submitted in support or in opposition to these motions, the Court feels that it is safe in setting out the following facts about which the parties have some semblance of agreement.

From May 1977 until January 1979 the plaintiff flew

as a "replacement pilot" for Wien Air Alaska. During this period ALPA and Wien were engaged in a bitter strike that was resolved only after intervention by the President of the United States. As part of the agreement which ended the strike, the striking pilots replaced those nonunion pilots who had flown during the strike. The nonunion pilots were furloughed, and ALPA agreed not to take any retaliatory action against them. Peterson contracted to fly for Piedmont in May 1979 and began flying as a first officer on June 16, 1979. No written contract was executed but Peterson's rights and responsibilities were set out in the Piedmont-ALPA collective bargaining agreement (CBA), to which he was subject. Under the terms of the CBA Peterson was to fly as a probationary employee for the first twelve months of his employment, during which time he was to be liable to dismissal at the discretion of Piedmont.

Peterson flew without incident until July 19, 1979, when at the inquiry of a Piedmont pilot with whom he was flying, he confirmed that he had flown for Wien during the strike. During the next two weeks Peterson was subjected to sporadic harassment—he was insulted and refused permission to pilot the aircraft in flight. In the first days of August, Peterson called Piedmont's headquarters in Winston-Salem and spoke with Captain Saunders, the Senior Vice President for Operations, about the problem. Saunders invited Peterson to come to Winston-Salem and Peterson accepted the invitation. On or about August 3, 1979, Peterson met first with Saunders and next with Captain Sharp, the Director of Flight Operations and Acting Staff Vice President for Flight Operations. Exactly what transpired during these meetings

is disputed, but the end result was that Peterson was no longer on active flight status, and for the next three months received his salary from Piedmont while he searched for a new job. He began flying for Coleman Air Freight on October 1, 1979, at about twice his Piedmont salary. For the month of October he was receiving salaries from Piedmont and Coleman.

Peterson alleges that Piedmont fired him under pressure from ALPA, which at the time allegedly staged a surreptitious slowdown of flight operations. Furthermore, Peterson alleges that this slowdown was part of a much larger conspiracy by ALPA to punish all those pilots who flew for Wien during the strike. Peterson's complaint against Piedmont states counts for breach of contract, breach of duty of good faith and fair dealing and violation of the Railway Labor Act (45 U.S.C.A. § 151 et. seq.) (RLA). Against ALPA and the individual pilots he has filed alleging causes of action for blacklisting, conspiracy and intentional interference with a contractual relationship, and against ALPA alone he has filed alleging breach of its duty of fair representation. Defendants respond, arguing that the facts, even as presented by the plaintiff, show that no slowdown occurred, that he left of his own free will and that he has suffered no injury from the change of employer.

* * * * *

I (omitted) (plaintiff not required to exhaust contractual remedies because of the potential for bias in a remedial system administered and prosecuted by his adversaries).

II.

The most difficult legal question in this case is whether or not federal labor law preempts state law. Preemption is more often a question under the National Labor Relations Act (NLRA), because unlike the RLA, the NLRA is intended to be a comprehensive regulation of labor relations which is constantly evolving through the rulings of the National Labor Relations Board (NLRB), a body bringing unique expertise to labor disputes. The principal grounds for preemption by federal enactment in labor are to protect the jurisdiction of the NLRB and that conduct which the Congress has deemed deserving of protection. *See, e.g., Farmer v. Carpenters & Joiners Local 25*, 430 U.S. 290, 295-97 (1977). A corollary to this policy is that to allow the fifty states to regulate labor relations would create too great a danger of conflict among the jurisdictions involved. *Id.* Although the RLA is very different in concept from the NLRA, providing little more than a set of procedures by which the unions and management may negotiate, compromise and resolve disputes, the same policies inform the preemption inquiry. The Supreme Court has held that arbitration of "minor" disputes by the Systems Adjustment Boards is mandatory and exclusive on all parties to a collective bargaining agreement covered by the RLA. *Andrews v. Louisville & Nashville RR Co.*, 406 U.S. 320 (1972). The Court's reasoning was that first, Congress intended the procedures to be exclusive, *Id.*, at 332-33; and second, that it is necessary to implement the underlying Congressional requirement that collective bargaining agreements be interpreted consistent with the RLA and consistently from state to state, see *Id.* 324-24 [*sic*].

In Peterson's case there is no written contract and North Carolina, consistent with the Supreme Court's observation in *Andrews,* is an employment at will state. *Nantz v. Employment Security Commission,* 290 N.C. 473, 226 S.E.2d 340 (1976). Therefore, all Peterson's rights are to be found within the four corners of the CBA. Were Peterson's case one alleging only wrongful discharge, this would be a "minor" dispute under the RLA, and the *Andrews* case leaves little doubt that state law would be wholly preempted. This case is complicated, however, by the allegations against ALPA and the Court's holding *supra*, that Peterson is relieved of his obligation of first bringing his complaint to the Systems Board of Adjustment. The exclusivity of dispute resolution having been breached, the question must then be answered, whether federal preemption is required when the Board's jurisdiction is found to be nonexclusive. The Court's conclusion is that preemption is required in this case.

The Supreme Court has acknowledged that in the case of a "major" dispute a state court may have jurisdiction to adjudicate a case under the RLA, but the Court went on to state that the question of what body of law to apply is a separate question. *Brotherhood of Railroad Trainment [sic]* v. Jacksonville Terminal Co., 394 U.S. 369 (1969). For a case involving a "minor" dispute, no reason exists to conclude the question differently.

Joining the action against ALPA, over which the Systems Board has no jurisdiction, with the challenge to the integrity of the Systems arbitration process, Peterson's allegations retain a character analogous to a "minor"

dispute. The need to preserve the consistency of adjudications involving the RLA dictates that the "quasi-minor" dispute not be expanded to become an engraftment of the laws of the fifty states onto the body of applicable federal law.

The allegations made by the plaintiff have important federal repercussions, and this too cautions preemption. The action of ALPA using a slowdown to coerce Piedmont into firing Peterson, if proved, would establish a breach of the settlement of the Wien strike and a breach of the CBA with Piedmont, two results with "major" dispute characteristics. For this reason it is illuminating to analyze the case at bar as a "major" dispute as well as a "minor" one.

In *Jacksonville Terminal* the Supreme Court examined the question of when the RLA preempted state law in the context of a "major" dispute. In a two step analysis, the Supreme Court first answered the general question of whether or not preemption is warranted in cases of "major" disputes. The Court concluded that the efficacy of the detailed framework of the "major" dispute resolution procedures would be irreparably compromised were either side in a labor dispute allowed to use state law to circumvent those procedures. 394 U.S. at 377-80. Also, the Court reasoned that the very complexity of the dispute settlement scheme implied that exhaustion of the RLA procedures entitled both sides to use self-help, unrestricted by state limitations. *Id.* at 380-82. The rationale applies with equal force when the union in question implements a slowdown not authorized by federal law or

the CBA.

In the second step of its analysis, the Supreme Court looked to the NLRA for the limited purpose of determining the limits of protection from state interference. In doing so the Court emphasized the differences between the two enactments, but finding that the NLRA would protect the conduct in question, common situs picketing, and finding no difference in policy between the two acts on the particular conduct at issue, the Court held that such picketing is protected by the RLA from state interference.

In Peterson's case there are differences in policy between the NLRA and the RLA. The latter has nothing like the active enforcement mechanism and comprehensive provisions for policing labor conduct of the former. In cases under the NLRA state law is preempted unless the "state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." *Farmer*, 430 U.S. at 305 (footnote omitted).

Under the RLA federal preemption of the otherwise applicable tort law is a much more difficult question, but if the action of the union in question is conduct covered by the CBA, is conduct traditionally identified with labor disputes, is conduct economic in character, and is within the parameters of federally created obligations under the RLA, the Court concludes that it would require federal

preemption under the analysis used in *Jacksonville Terminal.* ALPA's grievance over the hiring of Peterson was controlled by collective bargaining agreements. Its alleged conduct—a slowdown—is both traditionally identified with labor disputes and economic in character, as well as being the type of discrimination against an employee which is subject to judicial review under the Union's Duty of Fair Representation (DFR). For these reasons it is the type of dispute which requires the preemption of state law in favor of federal law.

Viewed from the perspective of a "minor" dispute or a "major" dispute, this controversy between Peterson on one hand and ALPA and Piedmont on the other is one which is to be resolved under federal law alone.

III.

The preemption of state law has several immediate effects on this litigation. Most obvious, the Court will grant summary judgment for the defendants on all state law claims. As a result, all individual defendants are no longer parties to the litigation. This result is consistent with federal policy, which holds the union, not its individual members, responsible for union misconduct. *Ramsey v. Signal Delivery Service, Inc.*, 631 F.2d 1210, 1212-13 (5th Cir. 1980). Also consistent with federal labor policy, ALPA may not be subjected to liability for punitive damages; therefore, the claim against ALPA for punitive damages for breach of its DFR is dismissed. It is not the purpose of federal labor laws to punish. *International Brotherhood of Electrical Workers v. Foust*, 442

U.S. 42 (1979).

* * * * *

IV (omitted) (complaint did not state a cause of action against the carrier for violation of Section 2 Fourth of the Railway Labor Act, 45 U.S.C. § 152 *Fourth* (1982)).

V.

After judgment on the state law claims, the cause of action for breach of ALPA's DFR to the plaintiff is the remaining claim against it. ALPA argues that its duty to the plaintiff is limited to bargaining situations; therefore, even had it sought his firing no violation of its DFR to Peterson would be involved. This conclusion is reinforced, it is argued, by Peterson's failure to ask the union for help with his problem.

The Court disagrees. While the better course would have been to ask for the help of the ALPA executive committee, the Court is unwilling to limit the scope of the DFR to the bargaining and grievance arenas or predicate reliance on the DFR on a request for assistance in all cases. The Court believes that the DFR is broader—it is not simply the duty to bargain with the best interests of all those represented by the union in mind, but more, it is the duty to refrain from acting in an arbitrary and discriminatory manner regarding even a minority of one. *Steele v. Louisville & Nashville RR. Co.*, 323 U.S. 192 (1944); *Griffith v. United Automobile, Aerospace and*

Agricultural Implement Workers, 469 F.2d 181, 182-83 (4th Cir. 1972). Harassing a worker and instituting a slowdown in order to force the resignation or dismissal of that worker, when he or she is employed pursuant to a collective bargaining agreement negotiated under the auspices of the RLA is well within the conceptual limits of the duty of the union to represent all workers fairly. The Court is unable to say that no question of material fact exists and that ALPA is entitled as a matter of law to judgment on this claim asserted by Peterson. Summary judgment is therefore denied.

* * * * *

VI (omitted) (Plaintiff given leave to amend complaint to allege that the carrier aided and abetted the union in its breach of the duty of fair representation).

VII (omitted) (Plaintiff's motion to negate stipulation regarding damages is denied).

VIII (omitted) (union's motion for non-jury trial is denied).

/s/ Eugene A. Gordon

Eugene A. Gordon
United States District Judge

January 27, 1983

APPENDIX C

Order of the
United States Court of Appeals
for the Fourth Circuit
Denying Rehearing and
Rehearing En Banc

May 29, 1985

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1186

HOWARD B. PETERSON, III,

Appellant,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; WILLIAM ROBERT KOONTZ; WILLIAM GRAHAM MATHIS; DAVID BRUCE CROUCH; ARTHUR RALPH, MAGILL; DOES 1 THROUGH 200,

Appellees.

Appeal from the United States District Court
for the Middle District of North Carolina,
at Winston-Salem. Eugene A. Gordon, District Judge.

Upon consideration of the appellees' motion for an extension of time to file their petition for rehearing,

IT IS ORDERED that the motion is granted.

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan with the concurrence of Judge Widener and Judge Butzner.

For the Court,

John M. Greacen

Clerk

APPENDIX D

Decision of the
California Court of Appeal
in
Seritis vs. Hotel and Restaurant
Employees and Bartenders Union, Local 28

April 22, 1985

CERTIFIED FOR PUBLICATION

IN THE
COURT OF APPEAL OF THE STATE OF
CALIFORNIA FIRST APPELLATE DISTRICT
DIVISION ONE

KARIN SERITIS AND TERRI DELOACHE, *Plaintiffs and Respondents,* vs. HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS UNION, LOCAL 28, *Defendant and Appellant.*	A014245 & A024497 (Alameda County Super. Ct. No. 488584-7) April 22, 1985

Defendant Hotel and Restaurant Employees and Bartenders Union, Local 28 (hereafter Local 28), appeals from judgment entered in the action of plaintiffs Karin Seritis (Karin) and Terri DeLoache (Terri), against Local 28 and one Ray Lane for damages for "intentional infliction of emotional distress" and breach of "the statutory duty of fair representation" imposed upon unions by the National Labor Relations Act, 29 U.S.C., section 185.

The superior court had concluded that Karin's claim of damages for intentional infliction of emotional distress was barred by the statute of limitations. The judgment, as entered, awarded *each* of the plaintiffs, Karin and

Terri, against Ray Lane and Local 28, $25,000 in general compensatory damages, and $50,000 in punitive damages for breach of the duty of fair representation. Terri alone was awarded, against *both* defendants, an additional $50,000 in punitive damages for intentional infliction of emotional distress.

Both of the defendants thereupon moved for a new trial. Ray Lane's motion was denied, and that of Local 28 granted, on the *single* issue of "the relationship between its financial condition, and the amount of the punitive damage award." Ray Lane then appealed from the entire judgment, and Local 28 appealed from the judgment, *except* that part as to which the new trial had been granted.

The appeals were assigned to this division of our court. Pending the appeals and on the parties' stipulation and request, we "stayed" the appeal of Local 28. Thereafter, by an unpublished, *and now final*, opinion, we affirmed the superior court's judgment as to Ray Lane.

The superior court has now retried the case's issue as to the amount of punitive damages, if any, to be awarded against Local 28. It has iterated, adopted, and confirmed its earlier judgment. Pending before, and now decided by, us are Local 28's earlier appeal, and its appeal from the superior court's more recent determination.

Having read and considered the record, and the briefs of the respective parties, we shall also affirm the judg-

ment against Local 28. Our reasons follow.

In its appellate briefs, Local 28 selects evidence deemed favorable to itself, while completely disregarding all that is contrary. It becomes necessary to again state the substantial evidence rule by which Local 28, and we, are bound.

"Evidence, to be 'substantial' must be of ponderable legal significance . . . reasonable in nature, credible, and of solid value." (*People* v. *Johnson* (1980) 26 Cal.3d 557, 576; *Estate of Teed* (1952) 112 Cal.App.2d 638, 644.) And, when a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support it, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *It is of no consequence that the trial court believing other evidence, or drawing other inferences, might have reached a contrary conclusion.* (*Grainger* v. *Antoyan* (1957) 48 Cal.2d 805, 807; and see *People* v. *Johnson*, *supra*, 26 Cal.3d 557, 576-577.)

We state the facts of the case as they were presumably found true by the superior court.

Karin and Terri were at the here relevant times 18-year-old girls, fresh out of high school. They "had to

find a job," and, as stated by Terri, "the only thing I knew how to do was to be a waitress."

Local 28 was and is a San Francisco Bay area trade union which, under collective bargaining agreements, had become the exclusive bargaining representative of waitresses, and other occupations, within its jurisdiction. And under the agreements, waitresses generally were employed directly through Local 28. Karin, and later, Terri, applied for memberships in Local 28. They were accepted as, and became, members of the union.

Ray Lane, although classified as its secretary-treasurer, was the *chief executive* of Local 28. He characterized himself at the trial as having "the most powerful position in the union," with duties "to oversee" its entire operation. He also declared "that he was a very powerful person, and he was the head of the union." Waitresses were allowed to work, and were placed in and removed from their jobs, at the discretion of Ray Lane. He boasted about his "underworld connections" and "that he could step on anybody." A recent vice-president of Local 28, who was "doing clerical work in the office," testified that Ray Lane directed him to "pull" waitresses "off the job."

And Ray Lane, as had others in Local 28, made known to Karin and Terri his authority and position of power in the union.

Soon after Karin had joined Local 28 in 1974, she spoke to Ray Lane about a grievance with her employer, and her need for a waitress job. He asked if she would

be interested in other "well-paying jobs." Karin, of course, was interested. The jobs he then offered were "jobs [that] had to do with my having sex with men, women, and animals."

Karin declined the jobs, but Ray Lane persisted in his efforts to have her take one.

"[H]e proceeded to lay forth these job offers that he had in mind. . . . There was one arrangement with two gentlemen that needed a live-in sexual playmate. There was a monthly salary attached to that. There [were] . . . fun trains to Reno. I was supposed to be a sexual playmate of business associates of his that would charter the car or the train. . . . He wanted to set me up in an apartment where I would be available for parties which he would occasionally have and friends he would bring over, my sexual services would be available. He would pay for the apartment. . . . Yes, he asked me to have sex with a dog. He said there was a dog up in Reno, or up in Nevada that performed copulation on stage with the women and he said that friends of his that he brought up, women he brought up couldn't wait to get their hands on and said he would love to see me making love to that dog. . . ."

Karin responded: ". . . I said that those weren't really the kind of jobs I had in mind. . . . He said he didn't have anything available as far as waitressing was concerned at the time, but he did have a lot of other jobs such as the ones I mentioned. . . ."

On her own accord, however, Karin was able to obtain a job as waitress. But she was soon "fired"; and a business agent of Local 28 told her: "I've heard that you were pulled off your job . . .by Mr. Lane personally." He (the business agent) testified: "I didn't know that she had been pulled off the job until she came down to the union hall, and then I was informed by Mr. Perluss [her erstwhile employer] that [Ray Lane] had taken her off the job." Although she continued to seek such employment, and other waitresses were employed through the union, Karin never again was employed through Local 28.

A year or two after the above incident concerning Karin, Terri similarly found herself with an employer grievance, and the loss of her job. She went to the union hall where she met Ray Lane. Told about her misfortune, he said he would get her a better job, and suggested they meet in a nearby coffee shop the following day.

Upon so meeting, he complimented her on the size of her breasts, asked, "did I swing," and then said: "I don't know why you want to work as a waitress, . . . with a body like yours you could make a lot of money. . . . The first job he offered me was waitressing topless on a bus to Reno once a month. . . . He said I would make $500 to waitress topless on this bus once a month and I would make more money if I wanted to do more. . . . [And] he wanted me to go on a convention to Washington, D.C. in March of that year and I would work as a prostitute at the convention and make $300 plus all my expenses. . . . He said he had a friend, a woman friend who was a

lesbian who lived in Hawaii, that if I would live with her over there that she would get me a job in the best restaurant on the Island. [And:] He wanted me to go to Las Vegas and perform sex with a dog on the stage."

Terri kept saying: "No, I can't do that. Don't you have something? All I want to do is to be a waitress." Ray Lane said there were no waitress jobs.

Terri thereafter filled out a union referral card indicating she needed a waitress job. But while others over the years were regularly referred to such jobs Terri, with one exception, was not. The exception was a known "hangout" for prostitutes, which she declined. And during her many visits to the union hall hoping for a job, she was repeatedly asked by Ray Lane if she was "ready to swing." Terri lived with a roommate who was employed as a waitress through Local 28. The roommate was called "everyday" by Local 28 with job offers. "She'd say, 'Well, that's really not what I'm interested in, but can I send my roommate [Terri]?'" But Terri was not acceptable, and she never again received job offers from or through Local 28.

Seven other young women were witnesses at the trial. All testified to similar conduct by Ray Lane. One Mary who rejected his suggestions, despite repeated requests for jobs never received one. One Nancy, who turned down "prostitution" and "pornography" jobs, was warned not to tell anyone about Ray Lane's proposals; he said "there were ways he could quiet people." One Joni was told she would "never work in Oakland as a waitress."

And some kept their jobs by going along with Ray Lane's suggestions. But one girl, after a time, refused to "go along with what Lane wanted her to do"; she was assigned to a different job with most unpleasant duties. Another "agreed to have sex with Ray Lane himself," but quit when he asked her to do other things to which she could not agree; her job future thereafter does not appear.*

We observe at this point that many terms are used by the courts in describing the legal basis of punitive damages. Others were used by the superior court and plaintiffs Karin and Terri, in describing the conduct of Ray Lane. The terms are "oppressive," "malicious," "outrageous," "despicable," "arbitrary," "in bad faith," "discriminatory," "abusive," "criminal," and "wanton." Each, in our opinion, was supported by substantial evidence at the trial.

We now consider the several appellate contentions of Local 28.

I. *Contention*: Pervading Local 28's appellate briefs, appear arguments that there was no substantial evidence of malicious, oppressive, or outrageous conduct of Ray Lane, its chief executive officer. Under the evidence we have narrated, and the authority of *People* v. *Johnson, supra*, 26 Cal.3d 557, 576, *Grainger* v. *Antoyan, supra*, 48 Cal.2d 805, 807, and *Estate of Teed, supra*, 112

* We are told, without apparent controversy, that since the above-narrated events, Ray Lane has twice been convicted of felonies unrelated to this case.

Cal.App.2d 638, 644, the arguments are patently invalid.

II. *Contention*: "[Terri] DeLoache's action for infliction of emotional distress was based on Local 28's alleged discrimination in employment opportunities and therefore is preempted by the National Labor Relations Act."

The contention is contrary to established law.

In *Farmer* v. *Carpenters* (1977) 430 U.S. 290, the issue also was whether, by the National Labor Relations Act, "Congress intended exclusive jurisdiction to lie in the Board" in an action against a union for "intentional infliction of emotional distress." A union member had complained in "count two" of his California action that the union, in discriminating against him in employment opportunities, had "intentionally engaged in outrageous conduct, threats, and intimidation, and had thereby caused him to suffer grievous emotional distress." The court held that *ordinarily* complaints of discrimination in the accommodation of the special interests of unions and members in the hiring hall context, lay in the exclusive domain of the National Labor Relations Board. But, said the court, where the tort is essentially "the particularly abusive [or 'outrageous'] manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself," a state action will lie. The union member was held to have stated a cause of action against the union defendant by count two of his complaint.

And, confronted with a similar contention to that here

posed, the high court in *San Diego Unions* v. *Garmon* (1959) 359 U.S. 236, 243-244, stated: "[D]ue regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. . . . Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."

Under this authority we find the instant contention of Local 28 invalid.

III. *Contention:* "The judgments in favor of Seritis and DeLoache for Local 28's alleged breach of its duty of fair representation are not supported by the evidence and should be reversed."

Insofar as the contention is that neither malice, nor oppression, nor outrageous conduct was shown, as we have pointed out, it is palpably meritless.

But it embraces two other arguments.

The first is that "Local 28 was legally entitled to cause Seritis' discharge from employment for her nonpayment of dues and initiation fees."

It is observed that Local 28 concedes in its briefs that

as to both Karin and Terri, each was a "*member of Local 28 at various times material to this action.*"

And the claimed nonpayment of dues resulted during and after Karin's employment, from which she was "pulled" by Ray Lane, and left without income. Moreover, before she was pulled off the job, her employer had asked Local 28's business agent for an extension of time for such payment; the business agent testified: "I told him that was fine with me." Under such circumstances the equitable doctrine of estoppel will reasonably apply.

The remaining argument of the instant contention is that: "There was insufficient evidence that Local 28 failed to accord either Seritis or DeLoache the same job placement services it gave others similarly situated." The argument is found frivolous.

As sort of an unrelated and otherwise unstated or argued addendum to the instant contention, Local 28 says only: "Moreover, any DFR claims based upon Seritis' first application in September, 1974 and DeLoache's in February, 1976 were barred by the six-month statute of limitations set forth at Title 29, U.S.C. §160(b). See *Del Costello* v. *Int'l Brotherhood of Teamsters*, 76 L.Ed.2d 476 (1983)."

We observe first that Local 28's answer, upon which the trial's issues were drawn, alleged only that: "The causes of action alleged by the second amended complaint are barred by applicable statutes of limitations." Code of Civil Procedure section 458, providing that—"In

a pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section—(giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure;"—was wholly ignored.

Secondly, as to the instant argument we observe, contrary to the long existent requirements of rule 15(a), California Rules of Court, neither a "concise *heading* generally descriptive of the subject matter covered," nor "appropriate *reference* to the record," establishing that the point was raised in the trial court. Where such headings are absent the appeal is subject to dismissal. (*Wallace* v. *La Vine* (1940) 36 Cal.App.2d 450, 452; *Milano* v. *Bulleri* (1932) 125 Cal.App. 72, 73-74.) And where there is no record reference establishing lower court error, we are not obliged to consider the point. (*Harbor Ins. Co.* v. *Resolute Ins. Co.* (1972) 23 Cal.App.3d 190, 197; *Metzenbaum* v. *Metzenbaum* (1950) 96 Cal.App.2d 197, 199.)

Nor does our reading of the single cited authority, *Del Costello* v. *Int'l Brotherhood of Teamsters*, lend aid to the otherwise unsupported argument.

We consider the point no further.

IV. *Contention*: "The judgments in favor of plaintiffs Seritis and DeLoache on their claims for breach of the duty of fair representation must be reversed because there is insufficient evidence to support the findings that

it would have been futile for them to have attempted to exhaust their internal union remedies."

Here we note first, that Karin complained of the problems raised by Ray Lane and Local 28, to the National Labor Relations Board, and to a Mr. Hanley, the president of the Hotel and Restaurant International Union. The Board said it "couldn't go that far," and Mr. Hanley did not reply to her letter.

The trial court found that, with Ray Lane as Local 28's chief executive officer, it would have been futile for Karin and Terri to seek internal relief through Local 28. Under the evidence of the case that finding was certainly reasonable and proper.

Responding to a similar contention, the nation's high court in *Clayton* v. *Automobile Workers* (1981) 451 U.S. 679, 689, stated: "[C]ourts have discretion to decide whether to require exhaustion of internal union procedures. In exercising this discretion, at least three factors should be relevant: first, whether union officials are so hostile to the employee *that he could not hope to obtain a fair hearing on his claim*; second, whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks. . .; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim. *If any of these factors are found to exist*, the court may properly excuse the employee's failure to exhaust." (Emphasis added.)

V. *Contention*: "The trial court committed reversible error by refusing to specify the elements of the general damages awards of $25,000 each on plaintiffs Seritis' and DeLoache's claims for breach of the duty of fair representation."

From their very nature, the damages of Karin and Terri were, as argued by Local 28, "indefinite and uncertain" and therefore difficult of ascertainment. But beyond any doubt, the girls had been damaged substantially by Ray Lane's and Local 28's conduct.

"[I]t appears to be the general rule that while a plaintiff must show with reasonable certainty that he has suffered damages by reason of the wrongful act of defendant, once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult of ascertainment. . . . The law only requires that the best evidence be adduced of which the nature of the case is capable. . . . [A]nd the defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision." (*Dallman* v. *Southern Heater Co.* (1968) 262 Cal.App.2d 582, 594, and see authority there collected.)

No error is seen.

VI. *Contention*: "The trial court's conclusion that Local 28 ratified the malicious acts of defendant Lane and the portions of the judgment that award the plaintiffs punitive damages totalling $150,000 against Local 28 are unsupported by the findings and must be reversed."

The contention is a broad challenge to the trial court's conclusion that Local 28 was liable for the torts perpetrated on Karin and Terri by Ray Lane. Such liability does not exist, the union argues, unless the record shows that it "*ratified*" the conduct of Ray Lane.

Local 28 misapprehends the law.

Ray Lane, as heretofore noted, was the "*chief executive*" of Local 28; i.e., he held "the most powerful position in the union." And a labor union, in situations such as this, will be treated as a "*corporation*," in that "it acts through and is bound by the acts of its officers." (*Coats* v. *Construction & Gen. Laborers Local No. 185* (1971) 15 Cal.App 3d 908, 914.) And: "The trade union has grown from the early loose craft union into an institution comparable to a corporation or public utility. . . . This court has recently recognized the contemporaneous social responsibility of these organizations and the resultant legal amenability. . . . [W]e rejected as to labor unions the longstanding general rule that a member of an unincorporated association could not recover against the association for personal injuries sustained as a result of the association's negligence. The old approach regarded all members of the union as principals and agents or partners; hence, the negligence of any member would be attributable to any other member suffering injury. After analyzing the emerging entity status of a labor union, we concluded that the old rule could no longer be applied to unions. We also held that any judgment recovered from the union could be satisfied from the funds and property of the union alone." (*Daniels* v. *Sanitarium Assn., Inc.*

(1963) 59 Cal.2d 602, 604-605.)

Ray Lane's conduct, within the scope of his authority, *whether or not in violation of his duties* became the *act of the union.* (*Schumann-Heink & Co.* v. *U.S. Nat. Bank* (1930) 108 Cal. App. 223, 232.) Such a chief executive officer is "more than an agent." "He acts and speaks for the [union] in furthering its express objects." (*Moore* v. *Phillips* (1959) 176 Cal.App.2d 702, 709; and see *Halbert* v. *Berlinger* (1954) 127 Cal.App.2d 6, 17; *Herring* v. *Fisher* (1952) 110 Cal.App.2d 322, 330.) And for the tort of such a chief executive officer, within the scope of his authority, "a member of a labor union . . . may successfully maintain an action" against the union. (*Inglis* v. *Operating Engineers Local Union No. 12* (1962) 58 Cal.2d 269, 270; and see *Coats* v. *Construction & Gen. Laborers Local No. 185*, *supra*, 15 Cal.App.3d 903, 915.) Patently, where as here, there was no higher Local 28 authority, no need or opportunity for *ratification* existed.

Moreover, Ray Lane's tortious conduct, among other things, attended Karin's and Terri's interviews with him concerning union-related jobs, and grievances against their employers. Such matters were manifestly within the scope of his duties as Local 28's chief executive officer.

And were we, *arguendo*, to find a need for Local 28's ratification of Ray Lane's conduct, it would be reasonably concluded that such a ratification had occurred. Here Local 28's officers generally were aware of Ray Lane's complained of conduct, and he was nevertheless continued in office. As said in *Coats* v. *Construction & Gen.*

Laborers Local No. 185, *supra*, 15 Cal.App.3d at page 913: "([P]laintiff was assaulted by both [union agents] Rose and Andreoff on the Union premises, only being prevented from striking him by the intervention of others.) The evidence discloses that the Union by its conduct ratified the actions while having full knowledge thereof. Although informed of the actions of Rose and Andreoff, the Union did not repudiate them, in spite of the desire of the president to do so by discharging the two men. A reasonable inference is that the officers of the *Union ratified the actions of Rose and Andreoff.*" (Our emphasis.)

VII. *Contention*: "The trial court's awards of $100,000 in punitive damages against Local 28 for the alleged breach of its duty of fair representation are contrary to the per se rule of law prohibiting punitive damages and must be reversed."

Local 28's reliance, for "the *per se* rule of law prohibiting punitive damages" against labor unions, is upon *International Bro. of Electrical Wkrs.* v. *Foust* (1979) 442 U.S. 42. That case concerned a union's negligent failure "properly to process [a member's] grievance alleging wrongful discharge by his employer." Punitive damages had been awarded the employee member against the union. The high court *held only* that, "such [punitive] damages may not be assessed against a union that breaches its duty of fair representation by *failing to pursue a grievance.*" (Our emphasis.)

It appears that *International Bro. of Electrical Wkrs.* v. *Foust* is uniformly held as authority for *no more* than

its holding.

Thus in *Anderson* v. *United Paperworkers Intern. U., AFL-CIO* (1980) 484 F.Supp. 76 (disapproved and remanded on other grounds, 641 F.2d 574), the court said (p. 85): "[T]he [*Foust*] court limited its holding to only those DFR [duty of fair representation] cases where the Union 'breaches its duty of fair representation by *failing properly to pursue a grievance*.' . . . It would appear that even if the court intended to create a *per se* rule in *Foust*, it would apply only where a Union failed to properly pursue a grievance. . . . In this case, the Union breached its DFR by misrepresenting to its rank and file members the true effect of their severance pay provision; based upon such misrepresentations, the employees consistently ratified successive collective bargaining agreements with the understanding that, under any circumstances, they would receive their severance pay. They would not have ratified the agreements had the true nature of the severance pay provision been revealed. Since this case does not involve a failure to pursue an employee's grievance, this court finds the ruling in *Foust* instructive, but not specifically controlling . . . ." The court then followed the pre-*Foust* rule of *Butler* v. *Local U. 823, Int. Bro. of Teamsters, etc.* (1975) 514 F.2d 442, 454, stating: "[T]he Union must engage in 'outrageous or extraordinary conduct' in order to award punitive damages. . . . This court finds that the jury could reasonably have determined that the Union's conduct constituted an extraordinary breach of the DFR; the jury's award will not be modified or vacated. Furthermore, it is precisely this type of Union misconduct that

a punitive award is made for; this extraordinary remedy is necessary to deter the International Union from similar future violations. Accordingly, the judgment is neither modified nor vacated."

Shimman v. *Frank* (1980) 625 F.2d 80, 101, involved a member's beating, authorized or ratified by his union. Punitive damages had been awarded by the trial court against the union. The court said:

"As a threshold matter, the defendants argue that punitive damages are unavailable . . . . This issue is uncertain in light of the Supreme Court's recent decision in *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979). There, the court ruled that punitive damages could not be awarded against a union which breached its duty of fair representation [in failing to pursue an employee's grievance against his employer.]

"The courts of appeals are unanimous on the issue, however. In *Int'l Brotherhood of Boilermakers* v. *Braswell*, 388 F.2d 193 . . . Judge Wisdom wrote that punitive damages are allowable on a showing of 'actual malice or reckless or wanton indifference' by a union for the rights of its members. *Id.* at 199. That holding has been endorsed by the second and *ninth* [our emphasis] circuits. *Morrisey* v. *National Maritime Union*, 544 F.2d 19; *Cooke* v. *Orange Belt District Council*, 529 F.2d 815 . . . .

"This court, in *McCraw* [sic.] v. *United Association*

of Journeymen & App. of Plumbing, 341 F.2d 705, 706-07 . . . strongly suggested that punitive damages were unavailable under § 101. *McGraw*, however, has been subject to severe criticism by other courts. See *Feltington* v. *Moving Picture Machine Operators*, 605 F.2d 1251, 1257-1258 n. 4 . . .; *Simmons* v. *Avisco Local 713*, 350 F.2d 1012, 1018. . . . See also *Hildebrand* v. *Bd. of Trustees*, 607 F.2d 705, 707, 708 n. 4. . . .

"We need not address *McGraw's* present viability. The reason is that the underlying conduct complained of was an assault and battery under Ohio law. Punitive damages are clearly available under this pendant state claim. . . . Indeed, punitive damages in such situations have become 'common-place.'"

And in *Parker* v. *Local Union No. 1466, United Steelworkers* (1981) 642 F.2d 104, 106-107, it was said: "[It is] argued however, that these actions did not constitute conduct sufficiently 'invidious' to justify punitive damages. We disagree. In *International Brotherhood of Boilermakers* v. *Braswell*, 388 F.2d 193, 199 . . . we held that punitive damages were awardable . . . if the union acted with 'actual malice or reckless or wanton indifference to the rights of the plaintiff.' . . . The Union's admitted disregard of the rights of its members amounts to reckless or wanton indifference to the rights of the members. Appellants' argument that the decision of the United States Supreme Court in *IBEW* v. *Foust*, 442 U.S. 42, . . . precludes an award of punitive damages is unpersuasive. In that case the majority specifically declined to decide whether the punitive damages could

be awarded under the LMRDA and confined its decision to the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1976) 442 U.S. 42, 47 n. 9. . . . Justice Brennan, concurring in the result, noted that our decision in *Braswell* and those of other circuits have held punitive damages to be appropriate. . . ."

To the same general effect see: *Bise* v. *International Bro. of Electrial* [*sic*] *Wkrs.* (1979) 618 F.2d 1299, 1305-1306; *Maxwell* v. *United Auto. Aerospace & Agr.* (1980) 489 F.Supp. 745, 753.

No error is observed in the superior court's conclusion that: "The United States Supreme Court decision in *IBEW* v. *Foust*, 442 U.S. 42, does not bar the award of punitive damages in a case such as this, where the court has found reckless, intentional and malicious conduct of a criminal nature."

VIII. *Contention*: "The trial court's awards totalling $150,000 in punitive damages against Local 28 are grossly disproportionate to Local 28's annual net income of less than $10,000 and its net worth of approximately $61,000 and should therefore be reversed."

On Local 28's limited new trial the superior court found "on conflicting evidence that defendant Union Local is solvent and has sound financial prospects for the future."

There was, as indicated by the trial court, much "conflicting evidence as to the *net worth* of Local 28. Some

evidence indicated its net worth at around $450,000. But as we understand its contention, Local 28's liability for future death benefits to its members renders it insolvent, or nearly so. The death benefits, however, are not funded, and are paid generally from Local 28's current income from dues and initiation fees of its 4,200 members. There was actuarial evidence "that this union can expect to receive over the time period they will be paying out for . . . this death benefit," the sum of $39,156,000. And the liability for death benefits during that period was estimated at $7,182,541.

We discern no error in the superior court's conclusion that Local 28 "is solvent and has sound financial prospects for the future," or in the amount of punitive damages assessed against it.

Nor do we find merit in Local 28's claim that the superior court failed "to resolve" punitive damage issues, or to "consider" its net worth and current income.

The judgment against defendant Hotel and Restaurant Employees and Bartenders Union, Local 28, is affirmed.

CERTIFIED FOR PUBLICATION.

Elkington, J.

WE CONCUR:

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Racanelli, P.J.

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Holmdahl, J.

APPENDIX E

Order of the
California Supreme Court
Denying Hearing

August 15, 1985

Supreme Court of California

* * * *

ORDER

Appellant's Petition for Review is denied. The Reporter of Decisions is directed not to publish in the official appellate reports the opinion in the above-entitled appeal filed April 22, 1985 which appeared at 167 Cal.App.3d 78 (Cal. Const. art. VI, § 14; Rule 976 of the Cal. Rules of Court).

Dated: August 15, 1985